No. 15169

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JACK LEWIS AND JOE LEVITAN d/b/a CALIFORNIA FOOTWEAR COMPANY, AND TRINA SHOE COMPANY, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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In their brief to the Court, respondents do not contest the Board's finding that Trina was merely the *alter ego* of California Footwear, nominally carrying on the business at the Venice location under the control of California Footwear (Br. 3). Respondents nonetheless continue to urge that the Board's bargaining order with respect to the Venice business is improper. In support of their contention respondents advance two reasons which are not discussed in the Board's opening brief. This reply brief is directed solely to the adequacy of these reasons.

A. The union security clause in the contract between California Footwear and the Union does not excuse California Footwear's refusal to bargain with the Union

Contending that the contract in existence between California Footwear and the Union at the Los Angeles plant contained an illegal union security clause under Section 8 (a) (3) of the Act, respondents assert that the Board's bargaining order improperly "perpetuate[s] the coercive effect of [the] illegal * * * contract provisions" (Br. 10). It is not clear whether respondents mean only to defend their refusal to keep the contract in effect at the Venice plant (see Bd.'s brief, pp. 10–11, 41–42), or whether they mean that the alleged illegal clause also excused them from bargaining with the Union respecting the transfer of employees from the Los Angeles to the Venice plant (see Res. Br. p. 7). The latter contention has never specifically been made heretofore in these proceedings. Respondents initially referred to the union security clause in their answers to the complaint before the Board in which they alleged simply that the complaint "has the purpose and effect of enforcing a labor contract which contains an illegal Union Security clause" (R. 11, 13). The trial examiner treated the contentions as directed only to the propriety of respondents' "refusal to give effect to the existing union contract after the move to Venice" (R. 67, 68–69). The Board adopted without discussion the trial examiner's conclusion that the clause in question did not "relieve [California Footwear] of its obligations under the contract" (R. 69, 132–133). Respondents' exceptions to the trial examiner's Intermediate Report

likewise did not specify that they intended to rely upon the allegedly illegal union security clause for any purpose other than to justify the termination of the contract when the Venice operation began (R. 21–25). Accordingly, the additional contention that the clause also served to release California Footwear from its obligation to discuss with the Union the transfer of employees to the Venice plant has never been placed squarely before the Board, and has not been passed on by it.

In these circumstances, it would appear that respondents are not in a position to press the latter contention before the Court. Section 10 (e) of the Act specifically precludes consideration by the courts of appeals of any "objection that has not been urged before the Board, its member, agent, or agency," unless "extraordinary circumstances" excuse the failure to raise the objection, and none is suggested here. By specifying a contention before this Court which at best was left vaguely general before the Board, respondents would set aside "the salutary policy adopted by Section 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 256.[1]

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[1] See also *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389; *N. L. R. B.* v. *Pappas & Co.*, 203 F. 2d 569, 571 (C. A. 9); *N. L. R. B.* v. *Pinkerton's Nat'l Detective Agency*, 202 F. 2d 230, 232–233 (C. A. 9).

Section 10 (e) aside, however, we show below that neither branch of respondents' argument predicated upon the union security clause is meritorious.

1. The union security provision of which respondents complain appears on its face to be fully lawful. It provides that (R. 68):

> Apprentices or inexperienced workers with less than 3 months' experience in the shoe industry shall secure work permits from the Union within two weeks of their hiring and shall become members of the Union after 30 days of employment.

The requirement of membership after 30 days of employment complies with the proviso to Section 8 (a) (3),[2] pursuant to which union security agreements of the type there specified are made permissible, and the requirement that apprentices and inexperienced employees must secure work permits in no way purports to condition their acquisition on union membership. This Court has recognized that agreements whereby "hiring of employees [is] done only through a particular union's office does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.'" *N. L. R. B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514, certiorari denied, 346 U. S. 814,

[2] Insofar as material, the proviso reads: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

quoting from the Board's decision in *Hunkin-Conkey Construction Co.*, 95 NLRB 433, 435.[3] By this reasoning, the work permit requirement in the present contract would appear no less improper than the kind of non-discriminatory hiring arrangement sanctioned by this Court. Respondents do not suggest, and the record does not show, that any discrimination on the basis of union membership was either intended or practiced under the clause. Accordingly the clause furnishes no valid reason for upsetting the Board's findings either that California Footwear was under a duty to recognize and bargain with the Union at its Los Angeles plant, or that it was not entitled to terminate the contract upon relocation of its business in Venice.[4]

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[3] See also *N. L. R. B.* v. *Longshoremen's Union*, 214 F. 2d 778, 781 (C. A. 9); *Eichleay Corp.* v. *N. L. R. B.*, 206 F. 2d 799, 803 (C. A. 3); *N. L. R. B.* v. *McGraw Co.*, 206 F. 2d 635, 640 (C. A. 6).

[4] The union security provision which this Court found illegal in *N. L. R. B.* v. *Ronney & Sons*, 206 F. 2d 730, certiorari denied, 346 U. S. 937, upon which respondents rely, is completely distinguishable. It contained no 30-day grace period for the acquisition of union membership, and thus did not meet the explicit requirement of the proviso to Section 8 (a) (3) (See n. 2, *supra*). Moreover, unlike the instant case, the work permit clause in *Ronney*, which the Board also contended to be invalid (Res. br., App. 4–5), did not stand alone. It was coupled with an option whereby applicants for employment could obviate whatever preconditions were placed upon the obtaining of work permits by the simple expedient of applying for union membership forthwith instead of awaiting the 30-day grace period. To the extent that the contract clause thus accords preferential treatment to job applicants who apply for union membership forthwith, it violates the Section 8 (a) (3) proscription against discrimination in hire or tenure of employment to encourage union membership.

2. Even if it were to be assumed that the union security clause in this case were invalid, it would nonetheless not excuse California Footwear's refusal to bargain with the Union respecting the transfer of employees to the Venice location. California Footwear did not rest its refusal to negotiate with the Union on the ground that, because of this clause, the Union was not the freely chosen representative of the employees, but on the pretext that it did not control the Venice plant. Respondents' present contention is patently an after-thought advanced to escape answerability for its attempt "to get rid of the union" (R. 155). Cf. *Superior Engraving Co.* v. *N. L. R. B.*, 183 F. 2d 783, 793 (C. A. 7), certiorari denied, 340 U. S. 930; *Polish National Alliance* v. *N. L. R. B.*, 136 F. 2d 175, 180–181, aff'd 322 U. S. 643. And respondents' position is no better for having executed the very clause which it now advances as a basis for avoiding its statutory obligation. Cf. *Medo Photo Supply Co.* v. *N. L. R. B.*, 321 U. S. 678, 687.

More fundamentally, the presence of a work permit clause in a contract between an employer and the certified bargaining representative of its employees does not by itself, even if invalid, require the breaking off of the bargaining relationship. Illustrative of this rule are the cases in which employers and/or unions which have been properly designated as employee representatives are found to have thereafter restrained employee organizational freedom by executing unlawful union security agreements. In this situation the Board ordinarily limits its cease and

desist order to the particular offending provisions of the agreement; it neither invalidates the entire contract, unless it finds the illegal clause inextricably interwoven into the overall agreement, nor does it require that the employer withdraw recognition from the union.[5] Such a restricted order is fully sufficient to remedy the unlawful practice, and in view of the propriety of the initial recognition given the union, a fact not questioned by respondents in this case, it cannot reasonably be assumed, without more, that the consequences of a single illegal clause are so far reaching as to destroy the representative character of the union.

The same reasoning underlies this Court's recent decision in *N. L. R. B.* v. *I. A. M.*, No. 15,099, decided February 20, 1957. Finding that a union security provision in that case was valid insofar as it specified that failure to pay dues should result in discharge of the delinquent employee, but invalid insofar as the same penalty was imposed for the failure to pay union assessments, the Court restricted its remedy to invalidating the assessment feature of the clause. The remaining portions of the contract were left in effect (slip opinion pp. 4–5). It follows, of course, that in the Court's view a breaking off of recognition of the union altogether because of the illegal assess-

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[5] See, e. g., *Hearst Publishing Company, Inc.*, 113 NLRB 384, 391; *Golden Valley Electric Assoc.*, 109 NLRB 397, 398; *Waterfront Employers of Washington*, 98 NLRB 284, 288–289, enforced 211 F. 2d 946, 951–952 (C. A. 9); *Utah Construction Co.*, 95 NLRB 196, 209.

ment clause would have been wholly improper. See also, *N. L. R. B.* v. *Rockaway News Supply Co.,* 345 U. S. 71, 78–79; *N. L. R. B.* v. *Sterling Furniture Co.,* 202 F. 2d 41, 43, 44 (C. A. 9); *N. L. R. B.* v. *Childs Co.,* 195 F. 2d 617, 618–619 (C. A. 2). Only where the quantum of coercion on the part of the employer or union reaches the point where it may fairly be said that the union cannot represent the free choice of the employees may disruption of a properly established bargaining relationship be found appropriate.

The difference in the two kinds of cases is aptly illustrated by this Court's decision in *N. L. R. B.* v. *Ronney & Sons,* 206 F. 2d 730, certiorari denied, 346 U. S. 937, erroneously relied on by respondents. The illegal union security agreement in that case was only one of a series of actions undertaken by the employer "designed to oust [an incumbent union] from its plant and replace it with the [favored union]." 206 F. 2d at 734. The overall assistance given the favored union in that case was plainly adequate to warrant the conclusion that recognition of it should be withdrawn until it could demonstrate in a Board election that the employees, free from intimidation and interference, wished to be represented by it. All that is relied on by respondents in the instant case to show that the Union "was maintained by illegal compulsory union membership contract provision" (Res. br., p. 7) is the alleged invalidity of the work permit requirement respecting inexperienced employees, found in an otherwise valid union security agreement. As we have shown, this is an insufficient ground upon which to

put an end to a properly established bargaining relationship.

This Court's recent decision in the *I. A. M.* case, *supra,* also disposes of the other branch of respondents' contention, i. e., that the presence of the work permit clause excused California Footwear from keeping the contract in effect at the Venice plant. Assuming again, *arguendo,* that the clause in question was invalid, the course open to California Footwear, just as that open to the employer in the *I. A. M.* case, was to cease giving effect to the clause, but not to terminate the entire contract. Here, no less than in the *I. A. M.* case, the allegedly illegal clause was severable from the remainder of the contract, and thus "in no way invalidates the [remaining] provision[s]." *I. A. M.* case, slip opinion, p. 2. See also *N. L. R. B.* v. *Rockaway News Supply Co.,* 345 U. S. 71, 78–79.[6]

B. Respondents' attempt to refute the Board's finding that California Footwear refused to bargain with the Union with respect to the transfer of its employees to the Venice plant is unavailing

Respondents do not contend that the transfer of employees to a new plant is an inappropriate subject for collective bargaining or that California Footwear did not control operation at the new location in

[6] As noted by the Trial Examiner (R. 68–69), here, as in the *Rockaway News* case, the contract contained a separability clause. Moreover, it is noteworthy that the Union in this case had not sought to enforce the union security clause, and had, during the contract's existence, proposed to delete it (*ibid.*). Finally, it may be observed that there is no requirement in the Board's order that the contract in this case, which had expired before the hearing in this case had closed, be maintained in effect (R. 142–145).

Venice. On this phase of the case respondents argue only that California Footwear did not refuse to discuss the transfer question with the Union, but, on the contrary, that Lewis, on behalf of California Footwear, referred the Union to Fellman as spokesman for the company on this matter (Res. Br. 8). The record in no way supports this factual contention.

Lewis' stated reason for referring the Union agent to Fellman, when requested to discuss the transfer of employees to the Venice plant, was that California Footwear "was going out of business," not that Fellman would discuss the matter for California Footwear (R. 194, see Bd's opening brief, pp. 9–10). Fellman was held out by Lewis as the owner and operator of a business which was entirely separate and independent from California Footwear. In short, Lewis made it clear that California Footwear would not discuss the matter and that negotiations with Fellman would have to be undertaken, not on the assumption that California Footwear was moving to a new location, but that Fellman had no obligation to regard the employees at the Los Angeles plant as employees of the company he represented, and that he would be hiring employees to work for a different employer. It is thus plain that there is no factual support for respondents' contention.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that a decree should be issued enforcing the Board's brief in full.

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